circumstances there can be no doubt that the petitioner has been "ordinarily resident" in the Federation since 1955. As Viscount Cave, L.C. said in *Levene* v. *Commissioners of Inland Revenue*: (2)

"The word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.' No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'. In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea."

In *Fox* v. *Stirk*,(3) where the qualification to vote at a parliamentary election in any constituency depended on the voter being "resident" there on the qualifying date, Lord Denning M.R. quoted Viscount Cave L.C. with approval and went on as follows: —

"Hence I derive three principles. The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man a resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.

....

I think that a person may properly be said to be 'resident' in a place when his stay there has a considerable degree of permanence."

What is the object and purpose of section 49(1)(b) but to spare a wife needless hardship? The prescribed period of three years could only have been intended to prevent transient visitors, who are not *bona fide* resident, with some degree of permanence. in the Federation from availing themselves of the court's assistance. The crucial fact required to be established by the wife is residence for *at least* three years. The petitioner in this case has in fact been ordinarily resident in the Federation for over 15 years. The greater must include the lesser. Any other interpretation would mean hardship compelling the petitioner to seek her divorce in Ireland. The petition is not even contested.

I would accordingly allow this appeal; costs of this appeal to abide by the decision on the petition.

Ali F.J. and **Chang Min Tat J.** concurred.

Appeal allowed.

Solicitors: *Lim Kean Siew & Co.; Thillaimuthu & Co.*

KHAMIS v. PUBLIC PROSECUTOR

[A. Cr. J. (Sharma J.) September 14, 1971]

[Malacca — Criminal Appeal No. 8 of 1971]

Criminal Law and Procedure — Evidence — Appeal — Plea of insanity or mental deficiency not suggested at the trial — Fresh evidence — Principles on which the appellate court should exercise its discretion in allowing fresh evidence to be called — Criminal Procedure Code (Cap. 21), s. 311.

This was an application under section 311 of the Straits Settlements Criminal Procedure Code (Cap. 21) for additional evidence to be adduced at the hearing of this appeal. The appellant was charged in the magistrate's court under section 353 of the Penal Code for having assaulted a field assistant in the discharge of his duties as a public servant. The appellant was not represented in the lower court but he claimed trial, cross-examined the prosecution witness and put up his own defence. The accused sought to set up the plea of insanity.

Held: the taking of additional evidence becomes necessary only if a failure of justice would result if such additional evidence was not taken. It is allowed when additional facts have come to light since the date of the trial. However, in this case, there was no evidence to support the plea of insanity.

[Editorial Note: As to when the court will or will not allow the fresh evidence to be called, see cases digested in *Mallal's* Digest vol. II §§ 4859-4878]

Cases referred to:-

(1) *R.* v. *Parks* [1961] 3 All E.R. 633 at p.634.
(2) *R.* v. *Lomas* [1969] 1 All E.R. 920 at p.923.
(3) *R.* v. *Atkins* 1 Cr. App. R. 45.
(4) *R.* v. *Dashwood* 28 Cr. App. R. 167 at p.169.
(5) *R.* v. *Pitchforth* 1 Cr. App. R. 249.
(6) *R.* v. *Herbert Collins* 34 Cr. App. R. 146 at p.148.

MAGISTRATE'S CRIMINAL APPEAL.

A. K. Bashir for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Sharma J., (delivering oral judgment): This is an application under section 311 of the Straits Settlements Criminal Procedure Code for additional evidence to be adduced at the hearing of the appeal. The appellant was charged in the magistrate's court, Alor Gajah, under section 353 of the Penal Code for having assaulted a field assistant in the discharge of his duties as a public servant. The appellant was not represented in the lower court but he claimed trial, cross-examined the prosecution witnesses and put up his own defence in as best a way as he could. The complainant was the officer in charge of the F.L.D.A. Scheme at Bukit Payong and one of his duties was to supervise the tapping of rubber by those who had settled in the area. The accused was one of such settlers. The prosecution evidence was that when the complainant (P.W.1) visited the area, he found the accused injuring the rubber trees. He advised the accused to tap the trees properly whereupon the accused told him that he could do what he liked. P.W.1 had to run away from the scene because the accused threatened him with the tapping knife and ran after him uttering the words that he (the accused) would kill P.W.1. The accused while cross-examining P.W.1 did suggest to him that he (the accused) was on a hill and that P.W.1 had asked him to come down. The defence put up by the accused was exactly in line with

the cross-examination of P.W.1. The accused in his defence stated that he came down the hill on orders of P.W.1 and that because of the existence of the sharp slope it happened that he came hurling down as it were with the tapping knife still in his hand He stated that he did not know why P.W.1 ran away when he saw him coming down the hill in that manner. This was a very intelligent and plausible defence, so much so that the learned magistrate had to visit the scene in order to come to the finding whether the defence put up by the accused could possibly be true. Some doubt obviously seems to have been raised in the mind of the learned magistrate and this doubt was not removed until he visited the scene and asked the parties to re-enact the whole incident as narrated by them in court.

The Settlements Code of course gives power to the High Court to take additional evidence if it thinks it *necessary*. The taking of additional evidence, however, becomes necessary only if a failure of justice would result if such additional evidence was not taken. The powers given under section 311 of the Settlements Criminal Procedure Code are no doubt to be exercised sparingly and only in suitable cases but once justification for the introduction of fresh evidence is shown there seems no restriction under the Code as to the kind of evidence which may be received. It may be formal or substantial. It should not, however, be received in such a way as to cause prejudice to the accused, as for instance it should not be allowed as a disguise for a retrial. Again the order should not ordinarily be made if the prosecution or the defence had a fair opportunity to produce such evidence but did not avail of it unless the requirements of justice dictated otherwise. The additional evidence can only be taken or ordered to be taken if the High Court thinks it necessary. Its necessity depends on the facts of each case. No hard and fast rule can be laid down. However, according to some authorities, the necessity for additional evidence should be apparent from the record itself and should not be sought from outside information, *i.e.* there should be some *prima facie* evidence bearing upon the guilt or innocence of the accused to be found on the record itself.

In the case of *R.* v. *Parks*[1] the Court of Criminal Appeal laid down the principles upon which the appellate court should exercise its discretion in allowing fresh evidence to be called. Lord Parker C.J. delivering the judgment of the Court of Criminal Appeal observed:

"It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

Section 23 of the Criminal Appeal Act, 1968 in effect reproduces what the courts have always regarded as the criteria for allowing additional evidence to be adduced in an appeal. That section so far as is material provides that:

"(1) .... the Court of Appeal may, if they think it necessary or expedient in the interests of justice

(c) .... receive the evidence, if tendered, of any witness;

(2) .... the Court shall, unless they are satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise their power of receiving it if —

(a) it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(b) they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it ...."

In the case of *R.* v. *Lomas*[2] the accused was convicted of murder and although the defence did not challenge the opinion of an expert pathologist produced by the prosecution, it later obtained another expert of equal standing whose opinion was contrary to the opinion of the prosecution's expert on an issue which was material to the appeal. The Court of Appeal allowed fresh medical evidence to be admitted and in the course of the judgment said:

"This court was most reluctant to allow this fresh evidence to be given. The normal case where fresh evidence is tendered and received under this section is on a question of fact, where, for example, some eye-witness or *alibi* witness not previously available has later been discovered. Although the section in its terms appears wide enough to embrace fresh evidence of scientific or medical opinion, it seems to this court that only in most exceptional cases would it be possible to say that there was any reasonable explanation for not adducing such evidence at the trial, and it is said with force by counsel for the Crown that if the defence are content to go into the trial with a somewhat inexperienced pathologist, without asking for an adjournment to secure the assistance of a more experienced pathologist, they should not be allowed in this court to have a second chance. Counsel asked rhetorically, if this application were allowed, where is it to stop? However, in this case we decided to admit the evidence. We think the appellant's advisers took reasonable steps to secure the necessary medical evidence before trial and had from their proposed witness a report, which in certain important respects assisted their case, and it was reasonable, particularly with the Long Vacation about to begin, not to ask for an adjournment to obtain the advice of a more experienced pathologist. They could not foresee that when the time came their expert would find himself unable to disagree in any respect with Dr. Hunt."

In the case of *Joseph Atkins*[3] the court said:

"When there was no evidence of insanity at the trial there ought ordinarily be proof on affidavit before the Court, and not merely a statement .... Counsel must, if they think it necessary, on their own responsibility, subpoena witnesses to be present."

The proposed evidence should be placed before the court. In the present case an affidavit has been filed by the appellant's son to the effect that the appellant was taken to the General Hospital, Malacca in 1963 and in November 1970 by the police for observation and it stops short there. What the appellant proposes to do now is to lead fresh evidence as to the state of his mind on the day he is said to have committed the offence. There is nothing else in the affidavit to support the application and that itself cannot establish the plea of insanity. Legal process would

become indefinitely prolonged if evidence could be produced at any time and admitted by the appellate court without there being any real justification for it or interests of justice requiring it.

The case of *Dashwood*[4] was another case in which evidence of insanity was sought to be introduced at the appellate stage. Humphreys J. in this case said:

"It is the view of the appellant's counsel that he would have been well advised to raise the question of the appellant's sanity at the trial, but it was the express desire, and indeed the avowed determination, of the appellant that no such issue should be raised. This is, therefore, not a case in which some new evidence has come to light which was never dreamt of in the course of the trial. This is, in effect, an application that the court should substitute itself for the jury as a tribunal of fact and try the case anew on a new issue and on new pleas which were never before the jury. This court has no power to order a new trial and, dealing with the present case, it would indeed require some very remarkable circumstances to justify the court in turning itself into a tribunal of fact to decide such an important matter, when that matter was deliberately withheld from the consideration of the jury by the person who is now asking the court to embark on the inquiry.....

It is impossible for the court to say that the mere fact that the appellant differed from his counsel as to the best line to be taken for his defence is sufficient to prove that he was, on that date, owing to his insanity, incapable of conducting his own defence. One of the matters which this court has to consider is the probable result, of creating a precedent, if this application were granted. In our opinion, the result would be to open the door to every person charged with a serious crime to instruct his counsel to put forward such defence as he thought right before the jury, and, if that failed, to come to this court and ask that there should be an inquiry into his state of mind, so that the Court might be induced to say that the proper verdict should have been guilty but insane. We decline to accede to this course. Indeed, in our view, we have no power to enter on any such inquiry."

No fresh evidence has come to light which could not be said to be available at the time of the trial of the appellant. The appellant conducted his defence very well and there is no evidence before me that he was legally insane.

Additional evidence is allowed when additional facts have come to light since the date of the trial. There is no such allegation in the affidavits filed in support of the appellant's application. (See the case of *Pitchforth*[5]). In the case of *Herbert Collins*[6] Lord Goddard said:

"The danger of allowing further evidence to be called after conviction, and the reason why the court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: 'If this evidence had been given at the trial, it does not follow that the jury would have convicted or they might not have convicted.' That is especially true in cases where the defence is an *alibi*. Two or three witnesses perhaps are called to establish an *alibi*, which the jury reject. It is very often not difficult after conviction to find another witness or perhaps two or more witnesses who would be willing to come and support the *alibi* and it can always, be said: 'If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility.' That is one of the reasons why this court is necessarily reluctant to allow further evidence to be called after conviction."

The plea of insanity is sought to be set up but there is no suggestion in the supporting affidavits of any medical opinion having been sought or what the results of the observations of the police were when he was taken to the General Hospital, Malacca in 1963 or 1970. In the circumstances the application is dismissed.

Application dismissed.

Solicitors: *Bashir & Co.*

RE GRAHAM STARFORTH HILL

[O.C.J. (Mohamed Azmi J.) September 14, 1971]

[Kuala Lumpur — Originating Motion No. 36 of 1971]

Advocates and Solicitors — Admission — Ad hoc — Special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia for the purpose of particular case — Advocates and Solicitors Ordinance, 1947, s. 8A(2)(a).

This was an application to enable Mr. G. S. Hill to be admitted as an advocate and solicitor of the High Court in Malaya for the purpose of appearing as leading counsel in an income tax appeal case before the Special Commissioners of Income Tax.

It was alleged that Mr. Hill had special qualifications in income tax law and because he had been handling the case as a solicitor from the beginning, his qualifications and experience in the particular income tax appeal was of a nature not available in Malaysia.

Held: (1) on the evidence the applicant had not shown that he had special qualifications in income tax law;

(2) even assuming that the applicant had special qualifications or experience for the purpose of the particular case, the proceedings before the Special Commissioners of Income Tax for which the applicant was briefed is one which can be quite competently handled by an advocate and solicitor of Malaysia.

Observations on the distinction between "special knowledge" and "special qualification".

Cases referred to:-

(1) *Re S. K. Lee* [1971] 2 M.L.J. 40.

(2) *Re Michael John Mustill* [1971] 1 M.L.J. 175.

ORIGINATING MOTION.

Ronald T. S. Khoo for the petitioner.

K. A. Menon for the Bar Council.

Shiv Charan Singh (Senior Federal Counsel) for the Attorney-General.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by originating motion under section 8A of the Advocates and Solicitors Ordinance, 1947 to enable Mr. Graham Starforth Hill to be admitted as an advocate and solicitor of the High Court in Malaya, for the purpose of appearing as leading counsel for a certain company in an income tax appeal case which is to be heard before the Special Commissioners of Income Tax from September 20 to September 25, 1971. The applicant is neither a Malaysian nor is he normally resident in Malaya. The application is supported by an affidavit affirmed by Mr. Ronald T. S. Khoo, a partner in Shearn, Dela-